Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Maxine Rose,

Petitioner,

v.

Millicent Newton-Embry, Warden,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Tenth Circuit

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QUESTIONS PRESENTED

This case arises from the conviction of an actually innocent woman, whose trial counsel failed and refused to offer extant evidence of her innocence, including evidence that she was elsewhere at the time of the alleged commission of the alleged crimes.

I. MS. ROSE IS ENTITLED TO EQUITABLE TOLLING WHEN SHE IS "ACTUALLY INNOCENT" UNDER THE CARRIER STANDARD

II. MS. ROSE IS ENTITLED TO EQUITABLE TOLLING WHEN SHE DILIGENTLY SOUGHT TO FILE HER WRIT WITHIN THE ONE YEAR PERIOD BUT WAS UNSUCCESSFUL FOR REASONS BEYOND HER CONTROL

III. MS. ROSE WAS DEPRIVED OF HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY AT TRIAL NEITHER PREPARED NOR CALLED ANY WITNESSES ON HER BEHALF DESPITE THE HIS KNOWLEDGE OF CREDIBLE WITNESSES PLACING HER IN ANOTHER TOWN AT THE TIME OF THE ALLEGED OFFENSE

PARTIES TO PROCEEDING

The caption accurately reflects the parties to these proceedings. Maxine R. Rose was the Plaintiff below, Appellant in the Circuit Court and is the Petitioner herein.

The Millicent Newton-Embry, Warden, in her official capacity for the State of Oklahoma is the only other party hereto and has been since the filing of the Habeas Corpus Petition by the Petitioner.

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BASIS FOR JURISDICTION
IN THE SUPREME COURT

This Petition seeks the review of a judgment of a United States court of appeals; the basis for jurisdiction of the court of first instance, is predicated on Title 28 United States Code, §2241 and §2254 which provides the United States District Courts, generally, and, therefore, the United States District Court for the Western District of Oklahoma, specifically herein, possess jurisdiction over applications for habeas corpus by persons held in custody under a judgment and sentenec of a State court, which occur within the geographic boundaries of that district. The United States Court of Appeals for the Tenth Circuit stated that it exercised jurisdiction pursuant to 28 United States Code, §1291. In the instant cause the jurisdiction was invoked pursuant to the provisions of 28 United States Code, §2254 which permits the courts of the United States to vacate, set aside or correct a sentence which is subject to collateral attack. Section 1291 sets forth the appellate court's statutory authority to review the final orders of a United States district court.

Review in this Court from the decisions of the lower federal courts is discretionary and based on considerations of compelling importance and departure of the circuit court from the decisions of other circuit courts on the same issues or the departure of the circuit court from the usual course of judicial proceedings or has sanctioned such a departure by a United States district court. In such instances this Court is called on to exercise its superintending powers. Such discretionary jurisdiction is properly exercised in cases involving serious Constitutional procedural and representational issues. The statutory basis for this jurisdiction is 28 United States Code, §1254(1). The decision of the circuit court was rendered on September 5, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner informs this Court that there are three primary Constitutional provisions involved in this cause. First, is the Sixth Amendment issue of the effective assistance of counsel in the representation of this Petitioner at the State district court.

The Second Constitutional issue is the Due Process Clauses of the Fifth and Fourteenth Amendments to the extent that while she received procedural Due Process Petitioner did not receive Substantive Due Process.

Third, the Petitioner states that it is a violation of the Eighth Amendment to punish an individual who was not guilty of the offense charged.

Fourth the lower Courts have effectively denied the Petitioner the protections of the Great Writ by ruling only on the procedural provisions of 28 U.S.C. §2244(d)(1) and treated the limitation as immutable.

STATEMENT OF THE CASE

Petitioner, Ms. Rose, and her exhusband, Mr. Rose, were engaged in a domestic strife for the period beginning in 1997 to January 2000. On January 14, 2000 Mr. Rose's rented house burned. The State charged Ms. Rose with Arson in the First Degree in violation of 21 O.S. § 1401 and Arson Endangering the Life of Another in violation of 21 O.S. § 1405. At trial, Ms. Rose was represented by an attorney, James L. Hughes, who refused to call *any* witnesses despite his knowledge of their existence, including an alibi witness, who would establish Ms. Rose's innocence. It is also noted that Hughes failed to file any notice of alibi witness prior to trial as required by the criminal procedure statutes of Oklahoma.

Furthermore, the anticipatory witnesses, appeared, at trial, prepared to testify, but did not do so because Mr. Hughes declared that he "had won the case," at the time the prosecution rested. According to Mr. Hughes, Mr. Ruesewald's testimony would not be necessary despite the fact that his testimony would place Ms. Rose at a location some 15 to 20 miles from the crime scene at the critical time period of the commission of the crime. Similarly, Mr. Hughes "found" Leslie Jones's testimony "not necessary" despite the fact that her testimony would rebut the State's accusation; specifically, Ms. Rose went to Dallas to flee apprehension by establishing that Ms. Rose's trip to Dallas was made several weeks before the fire, to take her son to his medical appointment. Ted Ruesewald, Leslie Jones, and others appeared, anticipated testifying at trial, and waited outside the courtroom to be called for three days. The prosecution called five witnesses to testify against Ms. Rose and their testimony can be charitably described as circumstantial. Ms. Rose was convicted and subsequently sentenced to twenty years imprisonment on Count I and ten years imprisonment Count II. Prior to the date of the sentencing Ms. Rose changed attorneys and a motion for new trial was filed in the State district court. A hearing was had on the motion and witness Ted Ruesewald testified to the alibi of the Appellant herein. This testimony placed this Appellant some 20 miles from the scene of the crime at the time of its commission. While not disputing the testimony or its credibility the State district court found that the evidence would not have guaranteed a different jury verdict and denied the motion.

Appellant's new counsel prosecuted the direct appeal and raised the ineffective assistance of counsel argument along with other assignments of error at the time of trial. The Oklahoma Court of Criminal Appeals (hereinafter OCCA) denied any relief to the Appellant herein. Appellant's counsel subsequently received information which indicated the

potent[illegible] whereabouts and contact information of witnesses Tera Po[illegible] and Leslie Jones. The significance of Tera Pott's affidavit became especially important when the OCCA rejected Ms. Rose's Ineffective Assistance of Counsel claim based on her initial attorney's failure to call, depose, or interview Ted Ruesewald (an alibi witness) and Leslie Jones in the direct appeal. Ms. Rose's current counsel, sought and obtained verified information from Ted Ruesewald, Leslie Jones, and Tera Potts relating to her actual innocence.

However, counsel encountered great difficulty in ascertaining the whereabouts of Leslie Jones and Tera Potts, in particular. Ms. Potts, a former Cleveland County Sheriff's Deputy assigned to the jail, was extremely difficult to locate due to a domestic situation and divorce in which she was a party. Moreover, Ms. Potts's underwent a name change during this time period which further complicated locating her; specifically, Ms. Potts reverted to use of her prior last name. The fact of the matter is that Ms. Potts was definitely not looking for Ms. Rose's current counsel and many months elapsed during this search.

After Ms. Potts was located, through counsel's due diligence, she submitted an affidavit stating, she was on duty and monitoring jail inmates when she heard Mr. Rose (the alleged victim) tell another inmate at the Cleveland County Jail that he (Rodney Rose) burned down the house in which he was residing to 'frame' Ms. Rose and thereby gain custody of his children.

Subsequently, Ms. Rose filed an Application for Post-Conviction Relief in the District Court of Cleveland County, which was denied after an evidentiary hearing, again finding that the evidence would not have guaranteed a different trial result. Ms. Rose appealed that decision to the OCCA, which affirmed the district court's ruling. Consequently, Ms. Rose has

exhausted her State court remedies regarding her conviction.

Ms. Rose then marshaled her resources and filed her application in the United States District Court for the Western District of Oklahoma. It is worth noting that the Appellant has borne the full financial responsibility of her case from its inception in her attempt to demonstrate her innocence.

The Magistrate for the Western District filed a report and recommendation which advocated a dismissal of the case, due solely to the one-year limitation. The Appellant filed a response and objection to that recommendation which included the entire State district court record, including transcripts which fully demonstrated her failure to received effective assistance of counsel and which, further, demonstrated her probable innocence. No reference to any of those materials has ever been made by the United States District Court.

Indeed, even at the time of adopting the Magistrate's report the District Judge did not comment on any merits of the materials which had been provided in opposition to the report. With all deference to the District Court, who is an excellent jurist, this Order contains only "boilerplate" language which fails to demonstrate any specific factual deficiency in the Appellant's application for relief. Further, the Order treats only the procedural question as important and completely ignores the actual innocence aspect of this matter and summarily rejects the equitable tolling issue. Additionally, the District Court treats the one-year time frame as a hard statute of limitation and no discussion of the circumstances which led to the time delay is addressed or explained.

From the foregoing process the Petitioner filed her appeal of this cause Tenth Circuit Court of Appeals to obtain the relief.

The Circuit Court granted a Certificate of Appeal as to the issue of whether the Petitioner was entitled to equitable

tolling based on actual innocence and whether she established a violation of her right to effective assistance of counsel at the time of trial. The Circuit Court did not grant a COA on the third issue raised whether the intentional self concealment of the witness former Sheriff Deputy entitled the Petitioner to equitable tolling due to this being a circumstance beyond her control. The Circuit Court found that the limitation was exceeded by three weeks and that there was insufficient cause to grant the requested relief of equitable tolling. The Court found that the former Sheriff Deputy did not possess the necessary indicia of reliability. The Circuit further found that the fact that Rodney Rose had admitted to framing this Petitioner for the crime which he committed did not make out a claim of actual innocence for this Petitioner. The Circuit concluded that the proffered evidence, (i.e., the alibi witness, the rebuttal to State's flight theory and the admission by another of having committed the crime) merely impeached the State's case, and the Petitioner failed to further demonstrate that in light of such evidence no reasonable juror would have found her guilty.

The second claim, ineffective assistance of counsel, which the Circuit Court granted a COA was then not addressed because of the holding in the foregoing issue.

REASONS FOR GRANTING THE WRIT

The primary reason for granting certiorari in this case is to correct a miscarriage of justice which has been visited on this Petitioner. An "actual innocence" exception requires a showing that there is new evidence, not present in the trial, that makes it "more likely than not that no reasonable juror" *would* have found petitioner guilty beyond a reasonable doubt in the light of the new evidence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In this case the Petitioner's Trial Counsel presented no evidence

on her behalf at trial. The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."*Id.* at 328. This exercise has not been accomplished by either the Circuit or District Court.

She has had a procedural suspension of her right to have her wrongful conviction and imprisonment reviewed by the lower courts. This Court has noted the equitable tolling in prior cases. To the extent that the lower courts have treated this limitation as an absolute bar it is an improper denial of her habeas corpus rights. Such right cannot be so easily suspended.

Ms. Rose has contested her guilt since the inception of the charges herein. Her substantive issues have not been properly reviewed by the lower courts. Her ineffective assistance of counsel claim is valid and completely non-frivolous. Yet, she has not been able to get a substantive review of the claim, this Court is her last opportunity. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." *U.S. Const. Amend. VI.* "Ineffective assistance of counsel is deficient performance of counsel resulting in prejudice." *Strickland v. Washington*, 466 U.S. at 687. The defendant must show (1) that counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Id.* at 694. The performance of counsel is measured against an "objective standard of reasonableness," *Id.* at 688, "under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521(2003). Trial Counsel's omissions cannot be explained as trial tactics based on events occurring during the heat of trial.

This lawyer failed to file prior to trial any notice of alibi witness, required by Oklahoma law, to put the prosecution on notice of his intent to call such witness. The Trial Counsel knew of this witness months before the commencement of trial A criminal defense lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on. *Rompilla v. Beard*, __ U.S. __, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). Counsel's failure to make reasonable efforts in *Rompilla*, as in this case, precluded the petitioner's counsel from making informed strategic decisions about his clients case.

The limitation cannot be believed to have been intended by the Congress to crush the legitimate claims of the least among us nor to bar the review of those who are wrongfully convicted. This Court has the jurisdiction and the authority to set this matter right. It is believed this Court can and may do so without any conflict with the limitation or its own precedent. Indeed, it can give renewed clarification to the Circuits and District Courts regarding actual innocence procedures. Such a ruling would, ultimately, result in greater efficiency and reduced costs for all concerned.

CONCLUSION

Jury verdicts should be given great weight in the determination of facts in any given case. This presumption is based on a belief that both sides of a trial, prosecution and defense, have vigorously represented their respective interests. However, when a defendant's counsel completely fails to do more than appear at trial that verdict cannot be said to have been predicated on a complete determination of the facts of the case. When a defendant's lawyer has witnesses which contradict the State's case and he refuses to present that evidence to the jury he has not only betrayed his client he has

fired-up the engine of injustice. When he has evidence that his client was many miles from the scene of the crime at the time of its commission and fails to present such to the jury he has abrogated any entitlement to having his actions viewed as mere trial strategy.

An innocent woman, Maxine Rose, is sitting in prison today because of the failures of this "lawyer". Her ex-husband has admitted committing the crime and blaming her for it. To permit a procedural bar to prohibit review of these claims would only serve to underscore the tragedy this case has been. The Petitioner prays this Court grant her Petition and reverse the lower courts and at a minimum let her present her case to the jury, a defense no jury has ever heard.

Respectfully Submitted this 4th day of December, 2006

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APPENDIX

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
September 5, 2006
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAXINE R. ROSE,
Petitioner-Appellant,

v. **No.05-6245**
D.C. No. CIV-05-308-F

MILLICENT NEWTON-EMBRY,
Warden,
Respondent-Appellee.

ORDER AND JUDGMENT*[1]

Before **KELLY, McKAY** and **LUCERO,** Circuit Judges.

Maxine Rose, an Oklahoma state prisoner appearing

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[1]

The case is unanimously ordered submitted without oral argument pursuant to Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

with counsel, appeals the federal court's denial of her 28 U.S.C. §2254 petition. We previously granted Rose's application for a certificate of appealability ("COA") on two issues: (1) whether Rose is entitled to equitable tolling of the one-year period of limitations in 28 U.S.C. §2244(d)(1)(A) for reasons of actual innocence, and (2) whether Rose has established a violation of her Sixth Amendment right to effective assistance of counsel at trial.[1] For the reasons set forth below, we **AFFIRM** the district court's denial of Rose's petition as time-barred.

Rose challenges her state court convictions for Arson in the First Degree and Endangerment to Human Life by Commission of Arson in the First Degree. Her petition was filed on March 18, 2005, and is therefore governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA requires persons seeking a writ of habeas corpus who are in custody pursuant to

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[1] Rose raises a third issue in her appeal of the district court's denial of her petition, on which we did not grant a COA. Rose argues that she should be granted equitable tolling because forces beyond her control made it impossible for her to gather the evidence needed to file the petition within the one- year limitations period. Specifically, Rose argues that she diligently attempted to secure an affidavit from Tera Potts, but was frustrated in doing so by Pott's efforts to make herself scarce. This court has held that this type of delay does not meet the requirement of "extraordinary circumstances" necessary to excuse the failure to timely file. See Marsh v. Soares, 223 F.3d 1217, 1220 (10th 2000). Accordingly, we deny Rose's request for a COA on this issue and the affirm the court's ruling.

a state conviction to file their petitions within one year of the date on which direct review of the conviction concluded. 28 U.S.C. §2244(d)(1)(A). The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Rose's convictions on March 25, 2003. Her convictions became final for purposes of AEDPA on June 25, 2003, when the ninety day period during which Rose could have sought certiorari from the United States Supreme Court had passed. See Locke v. Saffle, 237 F.3d 1269, 1273 (10th Cir. 2001). Rose did not file her federal habeas petition until March 18, 2005. Taking into consideration the tolling period during which she sought collateral post-conviction relief in state court, the district court rightly found that Rose filed her petition three weeks after the one-year limitations period had expired.[2]

We have held that AEDPA's limitations period "may be subject to equitable tolling" if the petitioner is actually innocent. Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). This limited exception to the procedural default doctrine was developed to prevent "fundamental miscarriage[s] of justice." Schlup v. Delo, 513 U.S. 298, 324 (1995); see also Sellers v. Ward, 135 F.3d. 1333, 1338 (10th Cir. 1998). In order to claim actual innocence a petitioner must present new, reliable evidence that was not presented at trial. Such evidence typically consists of "exculpatory scientific evidence, trustworthy eyewitness

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[2]Rose has not presented copies of the relevant state trial, appellate or post-conviction records, foreclosing our independent determination of the appropriate tolling period for her collateral state court appeal. Rose does not, however, contest the district court's finding that her petition was filed after the limitations period had passed.

accounts, or critical physical evidence." Schlup, 513 U.S. at 324. Once such evidence has been presented, petitioner must further show that in light of the new evidence, "no reasonable juror would have found the defendant guilty." Id. at 329.

The one piece of evidence Rose presents is the affidavit of Tera Potts, an employee of the Cleveland County Sheriff's Office.[3] Potts attests that she overheard Rose's ex-husband tell another prisoner that he had committed the crime for which Rose was convicted and had framed Rose deliberately. This evidence does not have the indicia of reliability sufficient to make out a claim of actual innocence. At most, the evidence impeaches the credibility of some of the prosecution's witnesses. It does not fall into one of the categories of evidence, enumerated by the Supreme Court in Schlup, that conclusively demonstrates a petitioner's innocence. See id. at 324. Because the requirements for meeting the actual innocence exception have not been met, we affirm the district court's finding that Rose's petition is time-barred and is not subject to equitable tolling.

We granted a COA to Rose on a second issue, her claim of ineffective assistance of counsel. Determining Rose's petition time-barred, however, we do not address that claim. See Robinson v. Golder, 443 F.3d 718, 719 n.1 (10th Cir. 2006) (citing Slack v. McDaniel, 529 U.S. 473, 485 (2000) (holding

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[3]Two additional affidavits included with Rose's petition cannot be considered new evidence for purposes of this appeal. Although one of the affidavits post-dates Rose's direct appeal of her conviction to the OCCA, the substance of the evidence in both affidavits was considered by the OCCA when Rose raised the issue of ineffective assistance of counsel on direct appeal.

that where dismissal is due to procedural bar is correct, consideration of merits is unnecessary)).

The judgment of the district court is **AFFIRMED.**

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAXINE R. ROSE,

Petitioner,

vs. Case No. CIV-05-308-F

MILLICENT NEWTON-EMBRY, Warden,

Respondent.

ORDER

On June 6, 2005, United States Magistrate Judge Gary M. Purcell entered a Report and Recommendation, wherein he recommended that respondent's motion to dismiss petition for habeas corpus as time-barred be granted and petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed as untimely.

Presently before the court is petitioner's timely objection to the Report and Recommendation. The court has conducted a *de novo* review of the matter in accordance with 28 U.S.C. §636 (b)(1). Having done so, the court concurs with Magistrate Judge Purcell's analysis and recommendation in regard to respondent's motion. The court agrees that petitioner's habeas corpus petition is time-barred. The court finds that petitioner has not shown sufficient basis for equitable tolling. The court concludes that petitioner's arguments to the contrary are without merit. The court accepts, adopts and affirms the Report and Recommendation in its entirety.

APPENDIX

IT IS THEREFORE ORDERED that the Report and Recommendation issued by United States Magistrate Judge Gary M. Purcell on June 6, 2005 (docket entry no. 14) is **ACCEPTED, ADOPTED** and **AFFIRMED.**

IT IS ALSO ORDERED that respondent's Motion to Dismiss Petition for Habeas Corpus as Time-Barred, filed May 2, 2005 (docket entry no. 10), is **GRANTED.**

IT IS FURTHER ORDERED that Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, filed March 18, 2005 (docket entry no. 1), is **DIMISSED** as untimely. Judgment shall issue forthwith.

ENTERED this 30th day of June, 2005.

S/
STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE